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In The

Supreme Court of the United States

October Term, 1988

DOUGLAS COUNTY SCHOOL DISTRICT and
DOUGLAS COUNTY BOARD OF EDUCATION,

Petitioners,

vs.

DOUG JAGER and WILLIAM JAGER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *this* public school system's practice of broadcasting prayers at high school football games violate the Establishment Clause?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Doug and William Jager respectfully oppose the Petition for Writ of Certiorari filed by the Douglas County School District and Douglas County Board of Education ("the School System").

STATEMENT OF THE CASE

I. Statement of Facts

The facts of this case are accurately stated in the Court of Appeals' decision.[1] Of particular pertinence are the following findings of fact made by the trial court:[2]

> Doug and William Jager are descended from Native Americans. The Jagers possess and exhibit sincere religious convictions derived from: (a) the reverence of Native Americans for nature; (b) a fundamental belief in the intellectual capacity of human beings to identify and address the salient issues of human existence; and (c) a skepticism toward organized religious dogma that inhibits intellectual curiosity and scientific inquiry into questions and problems of human existence. The elder Jager is genuinely and legitimately concerned for raising his children, both Doug and his 14-year old sibling, in accordance with William Jager's religious values and beliefs.[3]
>
> The majority religious preference in Douglas County, Georgia is Protestant Christian.[4]
>
> High School football games in Douglas County are a school-sponsored activity. Games are played on school property at stadiums owned and operated by

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[1] This decision is reprinted in the petition for certiorari as Appendix I. The panel majority's statement of the facts is reprinted at A5 - A7.

[2] The trial court's order of February 3, 1987, reprinted in the petition as Appendix II, contains the trial court's findings of fact. For convenience, further reference to these findings will be cited to the page where they appear in the appendix to the cert petition.

[3] A50-A51, Finding #5.

[4] A51, Finding #6.

the Douglas County school system. The students who play football and the students who participate in the half-time marching band performance are supervised by salaried employees of the school system. * * * * [T]axpayer funds are used to pay for certain operating expenses, primarily electrical service for stadium lights and for the public address system.[5]

Invocations are a part of the pre-game ceremonies opening each home football game. First, an announcer introduces the invocation speaker and usually identifies the name of the church with which he is affiliated.[6]

The invocations at DCHS (Douglas County High School) have consisted of a prayer, addressed to God which asks for God's blessing. The prayers often opened with the words "let us bow our heads" or "let us pray" and frequently invoked reference to Jesus Christ or closed with the words "in Jesus' name we pray."[7]

Commencing in 1950, local ministers began to give the invocations.[8] From the early 1970's through 1986, [invocation speakers were recruited] through the Douglas County Ministerial Association ("DCMA"). The DCMA is a group of ordained clergy whose membership currently consists exclusively of Protestant Christian ministers.[9] With perhaps five (5) exceptions, every invocation delivered at DCHS football games from the years 1974-1986 was given by a Protestant Christian clergyman.[10]

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[5] A51, Finding #7.

[6] A52, Finding #12.

[7] A52, Finding #13.

[8] A53, Finding #22.

[9] A53, Finding #23.

[10] A54, Finding #25.

Beginning in the Fall of 1985, Doug Jager attempted to obtain relief from the Douglas County school system on his objections to the pre-game prayers. He began by writing to his school principal, John Stone. Stone responded by asking Tony Plunkett, the band director, to discuss the matter with the younger Jager. Plunkett, who was at the time routinely leading the marching band in recitations of the Lord's Prayer prior to every performance, proceeded to lecture plaintiff on Christianity.[11]

In March 1986, counsel for the plaintiffs contacted counsel for the school system to seek a solution to the instant dispute. This resulted in a June 2, 1986 conference between school Superintendent Kathryn M. Shehane, counsel for the school system, and the Jagers and their counsel. Shehane and her counsel, without notice to the Jagers or their counsel, invited members of the DCMA to participate in the meeting. At the meeting, two alternative proposals for modifying the invocation practices were discussed: an inspirational wholly secular speech and an "equal access" plan which retained some religious content.[12]

Upon plaintiffs' rejection of the "equal access" plan, Reverends Jamie E. Jenkins and Donald Mountain, both of the DCMA, met with counsel for the school system and proceeded to draft a compromise proposal. The stated purpose of the draft was to "perpetuate and regulate the traditional invocation as part of the opening ceremonies of school athletic events."[13]

In September of 1986, Superintendent Shehane met with the principals of Douglas County high schools to discuss the issue of pre-game prayers. The document drafted by Jenkins and Mountain was consid-

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[11] A54, Finding #26.

[12] A54, Finding #27.

[13] A55, Finding #29.

ered and the principals and Shehane decided to proceed in accordance with the equal access plan.[14]

On September 15, 1986, the principals of the Douglas County high schools informed their schools that the invocations would proceed at the football games . . . in accordance with the "equal access" plan. The terms of the plan, as announced, are coextensive with the terms set forth in the Jenkins/Mountain plan.[15]

Representatives of [the school system] never identified any secular purpose for the invocation until this lawsuit arose.[16]

One of the defendants' purposes in having and supporting an invocation prior to high school football games in Douglas County was motivated by a desire to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity.[17]

One of the effects of the prior practices in regard to invocations was to create the appearance or impression that the school system endorsed Protestant Christianity.[18]

II. The Decision of the District Court

The Jagers brought this lawsuit on September 19, 1986 seeking declaratory and injunctive relief to stop the Douglas County School System from "permitting, authorizing and condoning religious ceremonies at public high school athletic events."[19] A bench trial ensued on November 14 and 15, 1986. At trial, the School System vigorously

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[14] A55, Finding #31.

[15] A55, Finding #33.

[16] A56, Finding #36.

[17] A57, Finding #39.

[18] A57, Finding #40.

[19] Complaint, at 1.

defended its tradition of broadcasting pre-game prayers delivered by Protestant clergymen selected through the Douglas County Ministerial Association.[20]

After hearing evidence and argument from both sides, the trial court concluded that "[t]he central issue in this matter was the constitutionality of the practice of giving pre-game invocations at high school football games in Douglas County, Georgia, and not, as defendants contend, the facial constitutionality of the 'equal access' plan."[21] On February 3, 1987, the trial court decided this central issue in favor of the Jagers by issuing a declaratory judgment, but declining to grant injunctive relief based on the belief "that no additional restraint is necessary to assure the defendants' compliance with the provisions of this Order."[22]

The School System subsequently moved for "clarification" of the effect of the trial court's declaratory judgment on a proposal which surfaced in the trial testimony of School Superintendent Shehane labelled the "equal

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[20] The School System's trial brief, served November 13, 1986, makes no mention of any "equal access" plan.

[21] The trial court articulated this conclusion in its Order of June 2, 1987 in response to the eleventh-hour mootness argument raised by the School System. *See* Appendix IV to the petition for certiorari, at A63.

[22] Order of February 3, 1987 (Appendix II to the petition for certiorari, at A59).

access" plan.[23] In response to this motion, the trial court entered a further order on February 27, 1987 concluding that this "equal access" plan was constitutional on its face, but declining "to express any opinion as to the

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[23] A colloquy between the trial judge and lead counsel for the School System at a March 27, 1987 hearing offers some insight into the trial court's confusion and the School System's "heads-I-win; tails-you-lose" strategy with respect to the "equal access" plan:

> *Judge Tidwell:* [T]here were some changes between the equal access plan that was attached to his complaint [i.e., the Jenkins Mountain proposal] and the equal access plan as it is now [*i.e.*, the proposal described by Superintendent Shehane at trial]. Isn't it?
>
> *Mr. Jones:* I don't think so, your Honor, because the court ---
>
> *Judge Tidwell*: Wasn't the Ministerial Association, weren't they involved in the first and not in the second?
>
> *Mr. Jones:* Your Honor, I think the one thing you may be thinking about is what was called Exhibit B. It had a top part and a bottom part, and the top part referred to certain purposes, and so forth.
>
> But the plan itself, which appeared on the bottom, the Court found to be coextensive with what had been discussed earlier in the meetings between the ministers and counsel for the plaintiffs and the two Mr. Jagers.
>
> And the findings of fact of the Court are that the equal access plan, as described in the Court's judgment and as testified to by Ms. Shahan [sic: Shehane], were identical, if you will, to that earlier equal access plan. *So there's never been but one plan before the Court during the litigation. That was the plan that was formulated before this lawsuit was ever filed.* (Transcript of March 27, 1987, at 13-14 (emphasis supplied)).

application of the "equal access" plan."[24] Following the disposition of motions over the taxation of costs and attorneys' fees,[25] cross appeals from the trial court's rulings were taken to the Court of Appeals for the Eleventh Circuit.

III. The Decision of the Court of Appeals

The Court of Appeals' decision is accurately reprinted in Appendix I to the petition for certiorari. Supported by a concurrence "in the result reached by the majority and with the choice of legal authority to support its position",[26] the panel majority: (1) affirmed the trial court's order declaring the School System's pregame invocations unconstitutional; (2) reversed the trial court's order declaring the "equal access" plan constitutional on its face; and (3) remanded to the trial court for reconsideration of its award of attorneys' fees.[27]

On January 23, 1989, the School System sought rehearing *in banc*. By a majority vote of the Eleventh Circuit Judges in active service, this request was denied through an order issued on March 3, 1989.[28] On April 21, 1989, the Court of Appeals issued its mandate and judgment remanding the case to the trial court for disposition of the pending attorneys' fees issues.

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[24] Order of February 27, 1987, reprinted at Appendix III to the petition for certiorari, at A60.

[25] *See* Appendices IV & V to the petition for certiorari.

[26] Concurring opinion of Senior Circuit Judge John W. Peck, reprinted in Appendix I to the petition for certiorari, at A25 - A26.

[27] Appendix I to the petition for certiorari, at A25.

[28] Appendix VI to the petition for certiorari, at A75 - A76.

REASONS FOR DENYING THE WRIT

I. The Fact-Specific Basis Of The Decision Below Does Not Present A Certworthy Question Under Rule 17.1(c).

Contrary to the School System's contentions, this case does *not* involve presidential inaugurations, sessions of the United States Congress, or sessions of the United States Supreme Court. As the Court of Appeals' opinion makes readily apparent, this case involves the actions and the motives of one county public school system in the State of Georgia with a troubled history of noncompliance in matters governed by the Establishment Clause.[29] The trial court heard testimony from the elected officials who govern Douglas County's public schools and became convinced that their actions in having and supporting pregame invocations: (1) were "motivated by a desire to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity";[30] and (2) "create the appearance or impression that the school system endorsed Protestant Christianity."[31]

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[29] Beyond the facts found by the trial court with regard to Protestant Christian clergy involvement in the traditional recruitment of invocation speakers and in the School System's formulation of a response to this dispute over its traditional delivery of clergy-led pregame prayers, evidence at trial showed that, in Douglas County public schools, the practices of Gideon New Testament Bible distribution and teacher-led Protestant prayers persisted until 1986. Trial transcript at 40-42, 80-81, 202-203.

[30] Order of February 3, 1987 (Appendix II to Petition for certiorari, at A57, Finding #39).

[31] *Id.*, Finding #40.

This case turns on egregious evidence of religious favoritism in a public school setting. It offers no useful vehicle through which this Court can offer guidance to other federal courts confronted with Establishment Clause disputes over the question of more general application: constitutional limits on the accommodation of ceremonial invocations at public events. Under the circumstances, review of a case in which the trial court correctly found the facts and the Court of Appeals correctly applied the law would be a waste of this Court's resources.

II. The Court Of Appeals' Decision Does Not Present A Conflict Requiring Review Under Rule 17.1(a).

A. The Eleventh Circuit's Application of the Lemon Test to Prayer Broadcasts in a Public School Setting Does Not Conflict with Marsh or its Progeny.

This Court has issued numerous Establishment Clause decisions since *Lemon v. Kurtzman*, 403 U.S. 602 (1971). With one notable exception, the Court has employed the principles articulated in *Lemon* as the rationale for decision.[32] The lone exception, *Marsh v. Chambers*,

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[32] *Bowen v. Kendrick*, ___ U.S. ___, 108 S.Ct. 2562 (1988); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327; *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Mueller v. Allen*, 463 U.S. 388 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Stone v. Graham*,

(Continued on following page)

463 U.S. 783 (1983), rests on an historical analysis of the Framers' acceptance of "nonsectarian"[33] legislative prayer under circumstances which do not "symbolically place the government's official seal of approval on one religious view."[34]

This Court has never extended the unique analysis of *Marsh* to public school settings.[35] Indeed, the decisions of this Court indicate that *Marsh's* "historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Edwards v. Aguillard*, 482 U.S. at 583, n.4. *See also Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

(Continued from previous page)

449 U.S. 39 (1980); *Wolman v. Walters*, 433 U.S. 229 (1977); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

[33] 463 U.S. at 793, n.14.

[34] 463 U.S. at 792.

[35] The Court has been consistently vigilant to protect religious minorities in the public schools from expression of governmental favoritism toward the majority's religious preference that "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are the insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring). This vigilance reflects Justice Frankfurter's cogent observation: "In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (concurring opinion).

The Eleventh Circuit's majority opinion squarely addresses both *Marsh* and its progeny from the Sixth[36] and Seventh Circuits.[37] For the reasons articulated in this Court's opinion in *Edwards*, the Eleventh Circuit properly concluded that *Marsh's* unique historical analysis of the subject of legislative prayer has no application to the public school setting. 862 F.2d at 828-829 (Appendix I to petition for certiorari, at A10 - A12). On this basis, the Eleventh Circuit found *Van Zandt's* extension of the *Marsh* analysis to a legislative prayer issue arising over the existence of a prayer room in the Illinois state capitol building "inapposite here." 862 F.2d at 829 n.9 (Appendix I to petition for certiorari, at A12, n.9). Thus, *Marsh* and *Van Zandt* are readily distinguishable and not in conflict with the ruling here.

There is also no conflict with *Stein*. Contrary to the School System's characterization of this decision by a fragmented panel of the Sixth Circuit, *Stein holds* that the graduation ceremony prayers challenged in that case violated the Establishment Clause because they contained "language that is unacceptable under *Marsh*, language which says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours." 822 F.2d at 1410. The writing judge reached this conclusion under the rationale of *Marsh*. A second Sixth Circuit judge concurred in the result, but applied *Lemon* principles.

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[36] *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

[37] *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

The *result* in *Stein* does not conflict with the decision here; indeed, these cases are perfectly consistent in striking down sectarian prayers at public school functions. The reasoning underlying these uniform results is admittedly different. However, differences in the rationale employed by the Circuits for reaching uniform decisions do not, by themselves, warrant the exercise of this Court's power of certiorari.

B. The Eleventh Circuit Correctly Applied the *Lemon* Test.

The trial court found that pregame prayers as they were delivered in the Douglas County School System violated both the purpose and effect prongs of the *Lemon* test.[38] The trial court further found that the "equal access" plan at issue in this case was proposed by Douglas County Ministerial Association members for the express purpose of "perpetuat[ing] and regulat[ing] the traditional invocation as part of the opening ceremonies of school athletic events."[39] The record establishes that the School Superintendent and high school principals met and resolved to proceed in accordance with the Jenkins/Mountain "equal access" plan.[40] The School System's counsel told the trial court "there's never been but one ['equal access'] plan before the Court."[41]

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[38] Order of February 3, 1987 (Appendix II to petition for certiorari, at A57, Findings #39 & #40).

[39] *Id.*, at A55, Finding #29.

[40] *Id.*, Finding #31.

[41] See colloquy of March 27, 1987 reprinted at n.23, supra.

On this factual record, the Court of Appeals properly applied the *Lemon* test. In light of the trial court's finding that the School System had "never identified any secular purpose for the invocation until this lawsuit arose,"[42] the Court of Appeals correctly scrutinized the record for the actual motives (as distinguished from after-the-fact rationalizations) that animated the School System to embrace the "equal access" plan. This process of scrutiny understandably left concurring Judge Peck with "the haunting thought that the equal access plan comes across . . . as a thinly veiled attempt to continue the forty year old traditional pre-game prayer format found unconstitutional by the district court." 862 F.2d at 835 (Appendix I to petition for certiorari, at A25).

The Court of Appeals opinion does note that the School System rejected nonsectarian means for accomplishing the purported goals of the "equal access" plan: to inject dignity and solemnity into high school football games. However, the conclusion that pregame prayers in the Douglas County schools continue to violate both the purpose and effect prongs of the *Lemon* test hardly rests on that fact alone. There is overwhelming support for the determination that the School System acted with tainted motive, ranging from the trial court's explicit findings of fact based upon its first-hand review of the evidence to the evidence summarized in footnote 11 of the Court of Appeals' opinion. Moreover, nothing in the School System's "equal access" plan redresses the impression forged on forty years of constitutional violations that the Douglas County School System favors Protestant Christianity.

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[42] *Id.*, Finding #36.

As the panel majority's opinion observes: "[t]his message becomes even clearer when the context of these pregame prayers is understood." 862 F.2d at 831 (Appendix I to petition for certiorari, at A16).

III. There Is No Reason To Delay Resolution Of This Case Pending A Decision In *County of Allegheny v. ACLU*.

The School System has urged the Court to delay its decision on this petition pending the issuance of a decision in *County of Allegheny v. ACLU*, Case Nos. 87-2050, 88-90, & 88-96. These cases deal with the display of religious symbols on public property.

The School System argues that a decision upholding the displays at issue in those cases "would be further support for" its position. It does not specify how or why.

On the other hand, the School System contends that a decision finding these displays unconstitutional would have no controlling effect on this case.

The Jagers believe that any decision in the *County of Allegheny* cases would have, at most, marginal impact on this case. The factual bases for distinguishing this challenge to prayers in a public school setting from disputes over the display of religious symbols on public property are readily apparent. Given the Court's traditional fact-specific approach to Establishment Clause questions and its "unwillingness to be confined to any single test or criterion in this sensitive area,"[43] the prospect that this

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[43] *Lynch v. Donnelly*, 465 U.S. at 679.

case can or should hinge on the result in *County of Allegheny* seems most remote. In these circumstances, the remand of this case to the trial court for final disposition should not be further delayed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied without delay.

Respectfully submitted,

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